Alupanorama Metals Sdn Bhd & Anor v Okaya International (HK) Ltd & Anor

HIGH COURT (SHAH ALAM) — WRIT SUMMONS NO BA-22NCC-109–09 OF 2019
FAIZAH JAMALUDIN J
30 MARCH 2021

Civil Procedure — Setting aside — Application to set aside writ of summons and statement of claim — Dispute as to jurisdiction — First defendant was foreign entity — Whether High Court in Malaysia had jurisdiction to deal with action instituted by plaintiffs — Whether plaintiffs made full and frank disclosure of all material facts — Whether there were serious issues to be tried — Whether plaintiffs had good arguable case against defendants — Whether plaintiffs could rely on s 23 of Courts of Judicature Act 1964 — Whether Malaysia was a forum non conveniens — Rules of Court 2012 O 11 — Courts of Judicature Act 1954 s 23

The plaintiffs were Malaysian incorporated companies, carrying on the business in Malaysia of purchasing, fabricating and selling metal products, in particular aluminium products. The second plaintiff was a subsidiary of the first plaintiff. The first defendant was a company incorporated in the Hong Kong Special Administrative Region of the People's Republic of China ('Hong Kong') and carried on business in Hong Kong. The second defendant was a state-owned enterprise of the People's Republic of China ('PRC') and carried on business in the PRC. In September 2019, the plaintiffs filed a writ and statement of claim against both defendants seeking declaratory reliefs for alleged breach of contract, fraud and unjust enrichment; full indemnity for the minimum sum of USD22,487,003.30 against potential claims against the plaintiffs' by its customers arising out of the defendants' breach of contract and fraudulent actions in the sale and supply of aluminium products; and judgment in the sum of USD206,211.81 together with interest for loss and damages suffered by the plaintiffs. The plaintiffs also applied to the court under O 11 of the Rules of Court 2012 ('the ROC') to serve out of the jurisdiction on the defendants the notice of the writ. On 23 September 2019, the court granted the plaintiffs leave to serve out of the jurisdiction the notice of the writ on the defendants ('the leave order'). Pursuant to the leave order, the plaintiffs served the notice of the writ together with the writ and statement of claim on the first defendant by way of personal service at the first defendant's office in Hong Kong on 22 October 2019. The application in the encl 17 was the first defendant's application to set aside the writ and statement of claim, the notice of the writ and the leave order under O12 r 10 of the ROC. The first defendant contended that the plaintiffs had failed to fully and frankly disclose all the facts

of the case, that there was no good arguable case and no serious issues to be tried, and Malaysia was the *forum non conveniens*, hence the court must set aside the leave order, the writ and statement of claim and the notice of the writ.

Held, setting aside encl 17:

(1) Based on the plaintiffs' pleadings in their statement of claim and their affidavit filed in support of the leave application, the court found that the plaintiffs had made full and frank disclosure of all the material facts of its transactions with the defendants in relation to the sales and purchase of the aluminium products and the delivery of the said products and the accompanying mill certificates. The material facts alleged by D1 to not have been disclosed by the plaintiffs during the application for the leave order were issues that ought to be tried (see paras 52 & 57).

(2) As regards to the first defendant contention that there were no serious issues to be tried between the first defendant and the plaintiffs, the learned judge had respectfully disagreed with the first defendant. The court was of the view that, the issues as to: (a) whether there was an 'Underlying Agreement' between the first plaintiff and the second defendant; (b) whether there was an obligation under the sales contracts between the first plaintiff and the first defendant, for the first defendant to supply aluminium products manufactured at the Guangxi Factory and to supply the corresponding mill certificates; (c) whether the aluminium products were delivered to the first plaintiff by the first defendant or by the second defendant; (d) whether the aluminium products, which were the subject matter of the sales contracts between the first plaintiff and the first defendant, were purchased for the second defendant's use; (e) whether there had been any delay in the shipment of the aluminium products; (f) whether the mill certificates were delivered to the first plaintiff by the first defendant or by the second defendant; (g) whether the plaintiffs suffered any loss as a result of the aluminium products delivered not being manufactured at the Guangxi Factory and the alleged misrepresentation on the mill certificates; and (h) whether the difference between the Guangxin Price and the Okaya Price, is 4% per year as claimed by the plaintiffs or 1% as claimed by first defendant, were all serious issues that ought to be tried (see para 59).

(3) For the purpose of the setting aside application, the court found that the sales contracts between the first plaintiff and the first defendant were entered in Malaysia. For purposes of the leave order granted under O 11 of the ROC, the court found that the plaintiffs had a good arguable case in that they had a good prospect of success — but as held by the UK Court of Appeal in *Nicholas Lousis Deak (deceased) and Another v Deak Perera Far East Ltd (In liquidation)* [1991] 1 HKLR 551 and approved by the Federal Court in *Joseph bin Paulus Lantip & Ors v Unilever Plc* [2018]

Supp MLJ 151 which held that a good prospect of success did not mean that the plaintiffs would probably succeed in the case (see paras 64 & 68).

(4) Section 23 of the Courts of Judicature Act ('the CJA') bestows jurisdiction on the High Court in cases that come within that said section. Thus, whether or not a plaintiff had obtained leave to serve the notice of the writ out of the jurisdiction under O 11 of the ROC, did not in any away negate or extinguish the High Court's jurisdiction over the non-resident defendant under s 23 of the CJA. The court was unable to agree with learned counsel for the first defendant that just because that plaintiffs had obtained the leave order to serve the notice of the writ on the first defendant out of the jurisdiction, they were not allowed to rely on s 23 of the CJA (see paras 72 & 75).

(5) The facts showed that save that the payment for the products were to be made by the first plaintiff in US Dollars ('USD') to the first defendant in Hong Kong, all the other transactions and the alleged breaches of contracts had taken place in Malaysia. The facts showed that the contracts between the first plaintiff and the first defendant were executed in Malaysia; the aluminium products and the mill certificates were delivered to the first plaintiff in Malaysia; the breach occurred in Malaysia; the breach was discovered in Malaysia; the plaintiffs had onward sold the aluminium products and provided the fraudulent mill certificates to its customers in Malaysia. even though P1's payments for the aluminium products are to be made to D1 in Hong Kong, the payments are made through online bank transfers — it does not necessitate P1 to physically fly to Hong Kong with the USD in cash to pay to D1. The court found that Malaysia was the forum which had the most real and substantial connection to the present case. Therefore, the courts in Malaysia was the more suitable or appropriate forum to try the action than the courts in Hong Kong and/or the PRC (see paras 89–90 & 92).

[Bahasa Malaysia summary

Plaintif-plaintif adalah syarikat-syarikat Malaysia yang diperbadankan, menjalankan perniagaan di Malaysia untuk membeli, membuat dan menjual produk logam, khususnya produk aluminium. Plaintif kedua adalah subsidiari kepada plaintif pertama. Defendan pertama adalah syarikat yang diperbadankan di Wilayah Pentadbiran Khas Hong Kong Republik Rakyat China ('Hong Kong') dan menjalankan perniagaan di Hong Kong. Defendan kedua adalah syarikat milik negara Republik Rakyat China ('RRC') dan menjalankan perniagaan di RRC. Pada September 2019, plaintif-plaintif telah memfailkan writ dan penyataan tuntutan terhadap kedua-dua defendan yang memohon relief deklarasi kerana didakwa melanggar kontrak, penipuan dan pengayaan yang tidak adil; ganti rugi penuh untuk jumlah minimum USD22,487,003.30 terhadap tuntutan yang berpotensi terhadap

plaintif-plaintif oleh pelanggan-pelanggannya yang timbul daripada pelanggaran kontrak dan tindakan penipuan pihak defendan-defendan dalam penjualan dan pembekalan produk aluminium; dan penghakiman sejumlah USD206,211.81 berserta faedah untuk kerugian dan ganti rugi yang ditanggung oleh pihak plaintif-plaintif. Plaintif-plaintif juga telah memohon kepada mahkamah di bawah A 11 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk menyampaikan di luar bidang kuasa ke atas defendan-defendan berhubung notis writ itu. Menurut perintah kebenaran itu, plaintif-plaintif telah menyampaikan notis writ itu bersama writ dan penyataan tuntutan ke atas defendan melalui penyampaian kediri di pejabat defendan di Hong Kong pada 22 Oktober 2019. Permohonan dalam lampiran 17 adalah permohonan defendan pertama untuk mengetepikan writ dan penyataan tuntutan, notis writ dan perintah kebenaran di bawah A 12 k 10 KKM. Defendan pertama menegaskan bahawa plaintif-plaintif telah gagal untuk menunjukkan sepenuhnya dan terus terang semua fakta kes, bahawa tiada kes kukuh untuk dihujahkan dan tiada isu-isu serius untuk dibicarakan, dan Malaysia adalah *forum non conveniens*, justeru mahkamah perlu mengetepikan perintah kebenaran, writ dan penyataan tuntutan dan notis writ itu.

Diputuskan, mengetepikan lampiran 17:

(1) Berdasarkan pliding plaintif-plaintif dalam penyataan tuntutan mereka dan afidavit mereka yang telah difailkan bagi menyokong permohonan kebenaran, mahkamah mendapati bahawa plaintif-plaintif telah membuat pendedahan penuh dan terus terang untuk semua fakta material berhubung transaksi-transaksinya dengan defendan-defendan berkaitan jual beli produk aluminium dan penghantaran produk tersebut dan sijil-sijil kilang yang disertakan. Fakta material yang dikatakan oleh D1 untuk tidak didedahkan oleh plaintif-plaintif semasa permohonan untuk perintah kebenaran itu adalah isu-isu yang patut dibicarakan (lihat perenggan 52 & 57).

(2) Berhubung hujah defendan pertama bahawa tiada isu-isu serius untuk dibicarakan antara defendan pertama dan plaintif-plaintif, hakim bijaksana telah dengan penuh hormat tidak bersetuju dengan defendan pertama. Mahkamah berpendapat bahawa, isu-isu mengenai: (a) sama ada terdapat 'underlying agreement' antara plaintif pertama dan defendan kedua; (b) sama ada terdapat obligasi di bawah kontrak jualan antara plaintif pertama dan defendan pertama, untuk defendan pertama membekalkan produk aluminium yang dibuat di Kilang Guangxi dan untuk membekalkan sijil-sijil kilang bersesuaian; (c) sama ada produk aluminium itu telah dihantar kepada plaintif pertama oleh defendan pertama atau oleh defendan kedua; (d) sama ada produk aluminium itu, yang merupakan hal perkara tentang kontrak jualan antara plaintif pertama dan defendan pertama, telah dibeli untuk penggunaan defendan kedua; (e) sama ada terdapat apa-apa kelewatan dalam penghantaran

produk aluminium itu; (f) sama ada sijil-sijil kilang yang telah dihantar kepada plaintif pertama oleh defendan pertama atau oleh defendan kedua; (g) sama ada plaintif-plaintif mengalami apa-apa kerugian akibat produk aluminium yang dihantar itu tidak dibuat di Kilang Guangxi dan dakwaan salah nyata sijil-sijil kilang itu; dan (h) sama ada perbezaan antara Harga Guangxi dan Harga Okaya, adalah 4% setiap tahuna sebagaimana didakwa oleh plaintif-plaintif atau 1% sebagaimana didakwa oleh defendan pertama, adalah kesemuanya isu-isu serius yang patut dibicarakan (lihat perenggan 59).

(3) Bagi tujuan mengetepikan permohonan, mahkamah mendapati bahawa kontrak jualan antara plaintif pertama dan defendan pertama dimasukkan di Malaysia. Bagi tujaun perintah kebenaran yang diberikan di bawah A 11 KKM, mahkamah mendapati bahawa plaintif-plaintif mempunyai kes kukuh untuk dihujahkan yang mana mereka mempunyai prospek kejayaan yang baik — tetapi sebagaimana diputuskan oleh Mahkamah Rayuan United Kingdom dalam kes *Nicholas Lousis Deak (deceased) and Another v Deak Perera Far East Ltd (In liquidation)* [1991] 1 HKLR 551 dan disahkan oleh Mahkamah Persekutuan dalam kes *Joseph bin Paulus Lantip & Ors v Unilever Plc* [2018] Supp MLJ 151 yang memutuskan bahawa satu prospek kejayaan yang baik dalam kes tersebut (lihat perenggan 64 & 68).

(4) Seksyen 23 Akta Mahkamah Kehakiman 1964 ('AMK') memberikan bidang kuasa ke atas Mahkamah Tinggi dalam kes-kes yang terangkum dalam seksyen tersebut. Oleh itu, sama ada atau tidak plaintif telah memperoleh kebenaran untuk menyampaikan notis writ di luar bidang kuasa di bawah A 11 KKM, tidak dalam apa cara menafikan atau melupuskan bidang kuasa Mahkamah Tinggi ke atas defendan yang bukan pemastautin di bawah s 23 AMK. Mahkamah tidak dapat bersetuju dengan peguam bijaksana untuk defendan pertama bahawa hanya kerana plaintif telah mendapat perintah kebenaran untuk menyampaikan notis writ ke atas defendan pertama di luar bidang kuasa, maka mereka tidak dibenarkan bergantung kepada s 23 AMK (lihat perenggan 72 & 75).

(5) Fakta-fakta menunjukkan bahawa kecuali pembayaran untuk produk-produk perlu dibuat oleh plaintif pertama dalam Dolar US ('USD') kepada defendan pertama di Hong Kong, semua transaksi lain dan dakwaan pelanggaran kontrak telah berlaku di Malaysia. Fakta-fakta menunjukkan bahawa kontrak-kontrak antara plaintif pertama dan defendan pertama telah dilaksanakan di Malaydia; produk-produk aluminium dan sijil-sijil kilang yang diserahkan kepada plaintif pertmaa di Malaysia; pelanggaran yang berlaku di Malaysia; pelanggaran yang ditemui di Malaysia; plaintif-plaintif telah seterusnya menjual produk-produk aluminium itu dan mengemukakan sijil-sijil aluminium

palsi itu kepada pelanggan-pelanggannya di Malaysia, meskipun bayaran P1 untuk produk-produk aluminium itu telah pun dibuat kepada D1 di Hong Kong, bayaran-bayaran itu telah dibuat melalui transaksi bank atas talian — ia tidak menghendaki P1 pergi secara fizikal ke Hong Kong dengan wang tunai USD untuk membayar kepada D1. Mahkamah mendapati bahawa Malaysia adalah forum yang mempunyai kaitan paling nyata dan substantial dengan kes ini. Oleh itu, mahkamah di Malaysia adalah forum yang lebih sesuai atau sesuai untuk mengadili tindakan tersebut daripada mahkamah di Hong Kong dan/atau RRC (lihat perenggan 89–90 & 92).]

Cases referred to

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160; [1995] 1 CLJ 273; [1995] 1 AMR 253, SC (distd)
Cantrans Services (1965) Ltd v Clifford [1974] 1 MLJ 141, FC (distd)
Castle Inn Sdn Bhd v Bumiputra-Commerce Bank Bhd [2009] 1 MLJ 542, CA (distd)
Cordova Land Co Ltd v Victor Bros Inc [1966] 1 WLR 793, HC (distd)
Goodness for Import and Export v Phillip Morris Brands SARL [2016] 5 MLJ 171; [2016] 7 CLJ 303; [2016] 5 AMR 1, FC (refd)
Hirex Petroleum Sdn Bhd v Mans Nicklas Lidgren & Ors [2017] MLJU 456; [2017] 1 LNS 492, HC (refd)
Joseph bin Paulus Lantip & Ors v Unilever Plc [2018] Supp MLJ 151; [2012] 7 CLJ 693, FC (refd)
Malayan Banking Bhd v International Tin Council [1989] 3 MLJ 286; [1989] 2 CLJ 961; [1989] 1 CLJ Rep 87, SC (refd)
Matchplan (Malaysia) Sdn Bhd & Anor v William D Sinrich & Anor [2004] 2 MLJ 424; [2004] 1 CLJ 810; [2004] 2 AMR 118, CA (folld)
Ng Hee Thoong v Public Bank Bhd [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA (refd)
Nicholas Lousis Deak (deceased) and Another v Deak Perera Far East Ltd (In liquidation) [1991] 1 HKLR 551, CA (refd)
Petrodar Operating Co Ltd v Nam Fatt Corporation Bhd & Anor [2014] 6 MLJ 189; [2014] 1 CLJ 18, FC (refd)
Rediffusion (Hong Kong) Ltd v AG of Hong Kong & Anor [1970] AC 1136; [1970] 2 WLR 1264, PC (refd)
SM Ameer Batcha v VK Kunjumon [1959] 1 MLJ 59; [1958] 1 LNS 74 (refd)
Seaconsar Far East Ltd v Banj Markazi Jonhouri Islami Iran [1993] 4 All ER 843, HL (refd)
Spiliada Maritime v Consulex Ltd 'The Spiliada' [1986] 3 All ER 843, HL (refd)
Vitkovice Horni A Hutni Tezirtvo v Korner [1951] AC 869, HL (refd)

Legislation referred to

Companies Act 1965 s 218
Courts of Judicature Act 1964 ss 23, 23(1), (1)(a)

Rules of the High Court 1998 [HK]
Rules of Court 2012 O 11, O 11 r 1, 1(1), 1(F)(i), O 12 r 10
Rules of the High Court 1980 O 11, O 11 r 1, 1(j)
Rules of the Supreme Court [UK] O 11 r 1(e)

V Premshangar (Lewis & Co) for the plaintiffs.
CS Mong (Amelia Loh Pui Yan with him) (Lee Hishamuddin Allen & Gledhill) for the first defendant.

Faizah Jamaludin J:

INTRODUCTION

[1] The plaintiffs are Malaysian incorporated companies, carrying on the business in Malaysia of purchasing, fabricating and selling metal products, in particular aluminium products. The second plaintiff ('P2') is a subsidiary of the first plaintiff ('P1').

[2] The first defendant ('D1') is a company incorporated in the Hong Kong Special Administrative Region of the People's Republic of China ('Hong Kong') and carries on business in Hong Kong. The second defendant ('D2') is a state-owned enterprise of the People's Republic of China ('PRC') and carries on business in the PRC.

[3] In September 2019, the plaintiffs filed a writ and statement of claim against both D1 and D2 seeking declaratory reliefs for alleged breach of contract, fraud and unjust enrichment; full indemnity for the minimum sum of USD22,487,003.30 against potential claims against the plaintiffs' by its customers arising out of the defendants' breach of contract and fraudulent actions in the sale and supply of aluminium products; and judgment in the sum of USD206,211.81 together with interest for loss and damages suffered by the plaintiffs.

[4] The plaintiffs also applied to this court under O 11 of the Rules of Court 2012 ('the ROC') to serve out of the jurisdiction on D1 and D2, the notice of the writ. On 23 September 2019, this court granted the plaintiffs leave to serve out of the jurisdiction the notice of the writ on the defendants ('leave order').

[5] Pursuant to the leave order granted by this court, the plaintiffs served the notice of the writ together with the writ and statement of claim on D1 by way of personal service at D1's office in Hong Kong on 22 October 2019.

[6] The application in this encl 17 is D1's application to set aside the writ

and statement of claim, the notice of the writ and the leave order under O 12 r 10 of the ROC. D1 had entered its appearance on 6 November 2019 and filed this application on 5 December 2019.

[7] Order 12 r 10 of the ROC states that a defendant who intends to dispute the jurisdiction of the court in a proceedings shall enter appearance and, within the time limited for serving a defence, apply to the court for:

(a) an order setting aside the writ or service of the writ on him;

(b) an order declaring that the writ has not been duly served on him;

(c) the discharge of any order giving leave to serve a notice of the writ on him out of the jurisdiction;

(d) the discharge of any order extending the validity of the writ for the purpose of service;

(e) the protection or release of any property of the defendant seized or threatened with seizure in the proceedings;

(f) the discharge of any order made to prevent any dealing with any property of the defendant;

(g) a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action; or

(h) such other relief as may be appropriate.

[8] One of the fundamental legal principles in determining the High Court's jurisdiction over a non-resident defendant (the jurisprudence and the evolution of this legal principle in Malaysia is discussed in the body of this judgment) is whether the High Court has jurisdiction either pursuant to a leave order to the serve the notice of a writ out of the jurisdiction on a non-resident defendant granted by the High Court pursuant to O 11 of the ROC and/or pursuant to s 23 of the Courts of Judicature Act 1964 ('the CJA').

[9] At the conclusion of the hearing of D1's application in encl 17, this court found that the High Court of Malaya does have jurisdiction over D1 pursuant to the leave order granted under O 11 of the ROC and also under s 23(1) of the CJA. It also found that Malaysia is not a *forum non conveniens*. For the reasons discussed in this judgment, this court found that Malaysia is the suitable or appropriate jurisdiction to inquire into and determine the issues in dispute between the plaintiffs and the defendants. D1's application in this encl 17 was accordingly dismissed.

[10] The full reasons for this court's decision in dismissing the application are set out herein.

LAW ON COURT'S JURISDICTION OVER NON-RESIDENT DEFENDANTS

[11] What is the 'jurisdiction' of a court? I find that Lord Diplock's explanation in the Privy Council appeal from the Supreme Court of Hong Kong in *Rediffusion (Hong Kong) Ltd v AG of Hong Kong & Anor* [1970] AC 1136; [1970] 2 WLR 1264 best describes the meaning of 'jurisdiction' and how it differs from 'cause of action'. His Lordship explained:

> 'An action' is an application to a court by a plaintiff for the grant of specified relief against the defendant. 'A cause of action' is a state of facts the existence of which entitles the court to grant to the plaintiff the relief applied for in the action. 'Jurisdiction' is the right of the court to enter upon the inquiry as to whether or not a cause of action exists in the plaintiff and, if a cause of action does exist, to grant or, if the relief is discretionary, to withhold the relief applied for. Conversely, lack of jurisdiction is absence of any right in the court to enter upon such an inquiry at all.

[12] Thus, where there is challenge on the court's jurisdiction, such as in this instant application, the court must decide based on applicable law and the facts of the case whether it has a right 'to enter upon the inquiry as to whether or not a cause of action exists in the plaintiff and, if a cause of action does exist, to grant or, if the relief is discretionary, to withhold the relief applied for'. As explained Lord Diplock in *Rediffusion (Hong Kong) Ltd v AG of Hong Kong & Anor*, a challenge on the court's jurisdiction can succeed 'only if it is shown that, no matter what were the facts that the plaintiffs would be able to establish relating to the subject-matter of the dispute ... *the Court would have no power to grant relief of the kind sought against the defendants*'.

[13] Three fundamental legal principles govern a Malaysian Court's jurisdiction over a non-resident defendant. They are: (a) jurisdiction is conferred on the court by O 11 of the ROC and/or s 23 of the CJA; (b) when determining whether it has jurisdiction over a non-resident defendant, the court must assume that the plaintiff's allegations in its statement of claim are true; and (c) after ruling that it has the jurisdiction to hear the plaintiff's claim against the defendant, the court must next decide, pursuant to the doctrine of forum non convenience, whether the Court in Malaysia or the court in another country is the suitable or appropriate forum to litigate the plaintiff's claim against the defendant.

Jurisdiction conferred by O 11 of the ROC and/or s 23 of the CJA

[14] The Supreme Court's decision in *Malayan Banking Bhd v International Tin Council* [1989] 3 MLJ 286; [1989] 2 CLJ 961; [1989] 1 CLJ Rep 87 is the first of the decisions of the Supreme Court and the Federal Court on the jurisdiction of the High Court over defendants who were not Malaysian

residents. The court held, per Azmi SCJ (as he then was), that 'service is not solely foundation of jurisdiction' of the High Court — that apart from O 11 r 1 of the Rules of the High Court 1980, the High Court may exercise its jurisdiction on a non-resident defendant who pursuant to s 23(1) of the Courts of Judicature Act 1964.

[15] Later, in *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160; [1995] 1 CLJ 273; [1995] 1 AMR 253, the Supreme Court held that the Malaysian Court can assume jurisdiction over a non-resident defendant statutorily under O 11 r 1 of the Rules of the High Court 1980 ('the RHC') (in pari materia with O 11 of the ROC), as the jurisdiction is implicit in the power to grant leave by the High Court for service out of jurisdiction.

[16] The evolution of Malaysia's jurisprudence on its court's jurisdiction over non-resident defendants continued when the Federal Court in *Petrodar Operating Co Ltd v Nam Fatt Corporation Bhd & Anor* [2014] 6 MLJ 189; [2014] 1 CLJ 18 was invited to consider the question whether O 11 of the RHC confers jurisdiction on the courts independently or is the jurisdiction conferred under O 11 predicated on s 23 of the CJA.

[17] The Federal Court in *Petrodar* held the jurisdiction conferred on the High Court under O 11 of the RHC is independent of and not predicated on s 23 of the CJA . Raus Sharif PCA (as he then was) held:

> [11] In regard to the first part of the question of law posed, learned counsel for the first defendant submitted that although the case of *American Express* clearly states that O 11 of the RHC confers jurisdiction, however, the case of *Rama Chandran* is the authority for the proposition that the Rules of Court on its own cannot confer statutory jurisdiction. We have anxiously deliberated on this issue and with respect we find that the first defendant's submission on this point is misconceived. The then Supreme Court case of *Malayan Banking Bhd v International Tin Council and another appeal* [1989] 1 CLJ 961 in considering whether s 23 of the CJA confers extra-territorial jurisdiction had clearly highlighted that O 11 of the RHC is clothed with the same powers ...
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> [13] We see no necessity to regurgitate what had been so admirably explained by His Lordship Gopal Sri Ram in the case of *MatchPlan Malaysia*. As such, premised on the decision of *Malayan Banking Berhad* and *MatchPlan Malaysia* we are of the considered view that O 11 of the RHC does not only confers jurisdiction but that it stands independently on its own and is not predicated upon, s 23 of the CJA 1964.

[18] The Federal Court, in its most recent decision on service out of jurisdiction — *Goodness for Import and Export v Phillip Morris Brands SARL* [2016] 5 MLJ 171; [2016] 7 CLJ 303; [2016] 5 AMR 1 — confirmed the

judgment of the Supreme Court in *American Express Bank* that O 11 of the RHC confers jurisdiction on the High Court and that the conferment of such jurisdiction is implicit in connection with the granting of leave by the High Court for service out of jurisdiction. It also confirmed the legal principles expounded by the Supreme Court in *Malayan Banking Bhd v International Tin Council* that O 11 of the RHC is not the High Court's only source of jurisdiction over a non-resident defendant: jurisdiction is also conferred on the High Court by s 23 of the CJA; and the judgement of the Federal Court in *Petrodar* that the jurisdiction conferred under O 11 of the RHC is independent and not predicated on the jurisdiction conferred by s 23 of the CJA.

[19] The Federal Court in both *Petrodar* and *Goodness for Import and Export* had cited with approval the majority judgment of the Court of Appeal in *Matchplan (Malaysia) Sdn Bhd & Anor v William D Sinrich & Anor* [2004] 2 MLJ 424; [2004] 1 CLJ 810; [2004] 2 AMR 118, where Gopal Sri Ram JCA (as he then was) delivering the majority judgment of the Court of Appeal explained:

> In Malaysia, the High Court is seised of jurisdiction over a dispute in any of the following three cases:
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> (i) where the defendant is served with the writ or other originating process within the jurisdiction; or
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> (ii) where any of the conditions set out in s 23 of the Courts of Judicature Act 1964 are satisfied; or
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> (iii) where a plaintiff is able to obtain leave of court to serve a defendant who is outside the jurisdiction of the court pursuant to RHC O 11.
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> ...
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> It is now settled by binding authority that the High Court may exercise jurisdiction over a non-resident defendant pursuant to s 23(1) of the Courts of Judicature Act 1964: *Malayan Banking Bhd v International Tin Council* [1989] 2 CLJ 961; [1989] 1 CLJ Rep 87.
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> ...
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> Once the court is seised of extra territorial jurisdiction by virtue of s 23(1), O 11 r 1 ceases to be of jurisdictional relevance. The decision in *Malayan Banking Bhd v International Tin Council* makes it plain that O 11 r 1 assumes jurisdictional importance only in cases falling outside the scope of s 23(1). Accordingly, in cases where s 23(1) applies, O 11 r 1 becomes a mere procedural formality to enable a plaintiff to effect service abroad.

[20] Ahmad Maarop FCJ (as he then was) delivering the Federal Court's judgment in *Goodness for Import and Export*, agreed with the Court of Appeal in *Matchplan* that '*in cases where* s 23 of the CJA applies, O 11 r 1 of the RHC *becomes a mere procedural formality to enable the plaintiff to effect service abroad*'.

Court must assume the plaintiff's allegations in statement of claim are true when determining court's jurisdiction

[21] A court, when determining whether it has jurisdiction over a non-resident defendant, must assume that the plaintiff's allegations against the defendant in its statement of claim are true.

[22] This legal principle was explained by the Court of Appeal in *Matchplan*, which principle was approved and followed by the Federal Court in *Goodness for Import and Export*. In *Matchplan*, Gopal Sri Ram JCA (as he then was) held:

> *It is elementary law that for the purpose of determining whether the High Court at Kuala Lumpur has jurisdiction over the defendants, the allegations made by the plaintiffs in their statement of claim must be assumed to be true*. Thus, in *Vanity Fair Mills Inc v T Eaton Co Ltd* [1956] 25 CPR 6 Waterman J observed as follows:
>
> > Although the parties presented many affidavits, depositions, and exhibits for the consideration of the district court, there has been no trial of facts, and the complaint is unanswered. *On an appeal from a judgment granting a motion to dismiss a complaint for lack of federal jurisdiction, we must assume the truth of the facts stated in the complaint*. (Emphasis added.)

[23] Ahmad Maarop FCJ (as he then was) delivering the judgment of the Federal Court in *Goodness for Import and Export* quoted with approval the Court of Appeal's judgment in *Matchplan* that in determining whether the High Court has jurisdiction, the court must assume that all the facts stated in the statement of claim are true. His Lordship held:

> [31] Does s 23(1) of the CJA [apply] in this case? *In determining the question whether in this case the High Court has jurisdiction under that section, the allegations by the plaintiff in the statement of claim must be assumed to be true* ... (Emphasis added.)

Is Malaysia a forum non conveniens?

[24] The Supreme Court in *American Express Bank* held that a court, after ruling that it has jurisdiction to hear a claim by a plaintiff against a non-resident defendant, would have to next consider whether to exercise its discretion on the doctrine of *forum non conveniens*, namely, whether or not to allow an application of the non-resident defendant to set aside the leave for service of the notice of the writ out of the jurisdiction granted to the plaintiff under O 11 of the RHC on the grounds that the High Court in Malaysia was or was not the *forum non conveniens*.

[25] Peh Swee Chin SCJ (as he then was) in *American Express Bank* explained the origins and the principle of the doctrine of *forum non conveniens* as follows:

> The doctrine of *forum non conveniens* appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritime Corp v Consulax Ltd (The Spiliada)* [1986] 3 All ER 843 after a series of decisions, ...
>
> The main judgment in the *Spiliada* was delivered by Lord Goff, who adopted the dictum of Lord Kinnear in *Sim v Robinow* [1892] 19 R (ct of Sess) 665, 668 as being the fundamental principle in regard to this doctrine ie that 'there is some other tribunal, having competent jurisdiction, in which, the case may be tried more suitably for the interests of all parties and for the ends of justice.' Lord Goff cautioned that the word 'conveniens ' in forum non conveniens meant suitability or appropriateness of the relevant jurisdiction and not one of convenience. We are in entire agreement with the fundamental principle so expressed.

[26] The Supreme Court in *American Express Bank* held that in cases of either the non-resident defendant's application to stay proceedings, or a plaintiff's application for leave to serve out of the jurisdiction under O 11 r 1 of the RHC, or a non-resident defendant's application to set aside such leave, the most important factor that a Malaysian court must consider is whether 'it would be unjust to the plaintiff to confine him to remedies elsewhere' and that this factor arises 'out of a great variety of factors that a Malaysian Court ought to consider in applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection'.

THE PLAINTIFFS' PLEADINGS IN THE STATEMENT OF CLAIM

[27] As pleaded in their statement of claim, the plaintiffs claim stems from sales contracts between P1 and D1 for aluminium products purchased by P1 from D1, which aluminium products were to have been supplied by D2 and manufactured at D2's own aluminium factory known as Guangxi Yinhai Aluminium Co Ltd located at Qiangjiang Industry Park, Guangxi, China ('the Guangxi Factory'). Pursuant to the sales contracts, the aluminium products were to be delivered to the plaintiffs in Malaysia together with mill certificates certifying that the aluminium supplied were manufactured at the Guangxi Factory.

[28] The plaintiffs plead that they had been purchasing aluminium products manufactured at the Guangxi Factory from D2 since 2012. And that in 2015, Jesse Cheng, an employee and representative of D2, proposed to the plaintiffs that they use D1's services to order and purchase the aluminium products from D2. The plaintiff plead that Jesse Cheng told them that by using D1's services, the plaintiffs would have high quality aluminium products manufactured at the Guangxi Factory together with legitimate mill certificates supplied by D2; but the plaintiffs would only have to pay an additional 4% per year on the purchase price that has been agreed with D2, which is lower than the interest

rate imposed by banks for their credit facilities obtained. They were also told by Jesse Cheng that D1 will give credit terms on the payment of the products ordered and purchased by the plaintiffs.

[29] The plaintiffs claim that based on the assurance from D2's representation on the quality and the price of the aluminium products, the mill certificates, and the credit terms to be provided by D1, they agreed to employ D1's services for their purchase of the aluminium products.

[30] The plaintiffs plead that the business transaction between them and the defendants are as follows:

(a) the plaintiffs will confirm with D2 the products to be purchased including the purchase price;

(b) the plaintiffs will then issue the purchase order to D1 for a similar order with a 4% per year increase in the purchase price that had been agreed with D2;

(c) D1 will then order the aluminium products from D2;

(d) D1 will issue a sales contract to P1 for every purchase order. P1 will execute the sales contract in Malaysia and email the executed contract to D1;

(e) D1 will then obtain the aluminium products from the Guangxi Factory and deliver to the plaintiffs in Malaysia, the products together with the mill certificates that assures the quality and composition of the products;

(f) D1 will issue an invoice to P1 for the aluminium products supplied with a mark-up of 4% per year ('the Okaya price') of the original purchase price agreed with D2 ('the Guangxin price');

(g) P1 will pay the Okaya price to D1; and

(h) D1 will pay the Guangxin price to D2.

[31] The plaintiffs claim that for the years from 2015 to 2018 they had purchased a total of 9520.7280 metric tonnes of aluminium products from D1 at the total price of USD22,487,003.30. And that for each of the purchases, D1 had delivered mill certificates certifying that the aluminium products were produced and manufactured at the Guangxi Factory, which the plaintiffs in turn supplied to their customers as assurance of the quality of the products sold.

[32] The crux of the plaintiffs claim against the Defendants is that the aluminium products supplied and delivered by D1 to the plaintiffs were not manufactured at the Guangxi Factory and the mill certificates provided by D1

were not certificates that guaranteed the quality and composition of the aluminium products as being manufactured at the Guangxi Factory . The plaintiffs plead that D1 had instead purchased aluminium products from a third party manufacturer (Pingguo Asia Aluminium Co Ltd) at a much lower price than the Guangxin price and supplied these third party products to the plaintiffs as products manufactured by the Guangxi Factory.

[33] The plaintiffs' causes of action against the Defendants are for breach of contract, conspiracy to cheat, fraud and unjust enrichment. They plead that the D1's and D2's conduct amounts to a breach of the fundamental terms of the agreements between them. Also, that D1 and D2 either on their own and/or together, conspired to cheat and defraud the plaintiffs by supplying aluminium products that were not manufactured by the Guangxi Factory and by furnishing incorrect and false mill certificates to the plaintiffs. The plaintiffs further plead that owing to these fraudulent acts, D1 had wrongfully and unfairly obtained unjust enrichment of profits (of more than 4% per year) from the sales of the aluminium products to the plaintiffs.

D1'S SETTING ASIDE APPLICATION

[34] D1 is seeking to set aside the writ and statement of claim, the notice of the writ and the leave order on the following grounds:

(a) the plaintiffs had failed to fully and frankly disclose all the material facts to this court when it made the leave application;

(b) the plaintiffs had failed to show that they have a good arguable case against D1 that falls within one of the limbs of O 11 r 1(1) of the ROC;

(c) there are no serious issue to be tried between D1 and the plaintiffs; and

(d) Malaysia is not the forum conveniens to try the dispute the plaintiffs and D1.

[35] Learned counsel for D1, Mr CS Mong argues that in applying for and obtaining the leave order, the plaintiffs must, fully and frankly disclose all material facts to the court, and they must also show that they have a good arguable case that falls within one of the limbs of O 11 r 1(1) of the ROC; there are serious issues to be tried; and that the Malaysian Court is the *forum conveniens*.

ANALYSIS AND FINDINGS OF THE COURT

[36] Mr Mong submits that the plaintiffs had failed to fully and frankly disclose all the facts of the case, that there is no good arguable case and no

A serious issues to be tried, and Malaysia is not the forum conveniens. Hence, for these reasons, this court must set aside the leave order, the writ and statement of claim, and the notice of the writ.

B **[37]** As discussed in part B of this judgment, the Federal Court in *Petrodar* and *Goodness for Import and Export* approved and agreed with the majority decision of the Court of Appeal in *Matchplan* that in determining whether or not it has jurisdiction over a non-resident defendant, a court must assume that that the plaintiff's allegations in its statement of claim are true. Thus, for purposes of D1's setting aside application in this encl 17, this court must C assume that the plaintiffs' contention as pleaded in their statement of claim is true.

[38] However, learned counsel for D1 submits that the Court of Appeal's D majority decision in *Matchplan* was erroneous and that this court is not obliged to assume that all assertions made by the plaintiffs in the statement of claim are true. Learned counsel submits that the proper test to determine the issue of jurisdiction is that in the minority decision in *Matchplan*.

E **[39]** With the utmost respect to learned counsel for D1, the Federal Court in both *Petrodar* and *Goodness for Import and Export*, had held that the majority decision in *Matchplan* is correct and went on to adopt the principles laid in that decision namely, that when determining whether or not the court has jurisdiction over a non-resident, the court must assume that a plaintiff's F pleadings in its statement of claim are true. This is in line with the decision of the Privy Council in *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* where Lord Diplock explained the reason why courts are to assume that all the facts in a plaintiff's statement of claim are true in a summons by a defendant that the court lacks jurisdiction, as follows:

G

> Since lack of jurisdiction has the consequence that the court has no right to enter upon the inquiry as to whether there exists a state of facts which would entitle the court to grant to the plaintiffs the relief sought, *the jurisdiction summons can succeed only if it is shown that, no matter what were the facts that the plaintiffs would be able to establish relating to the subject- matter of the dispute, … the court would have no power* H *to grant relief of the kind sought against the defendants*. (Emphasis added.)

[40] Pursuant to the doctrine of stare decisis, this court is bound to follow the majority decision of the Court of Appeal in *Matchplan*, as approved and applied by the Federal Court in *Petrodar* and *Goodness for Import and Export*. As I observed by Sutherland J more than six decades ago in *SM Ameer Batcha v VK Kunjumon* [1959] 1 MLJ 59; [1958] 1 LNS 74 'Stare decisis is a corner stone of our system of jurisprudence'. It is, thus, not open for this court to accept Mr Mong's submission that it should instead follow the minority decision in *Matchplan*.

[41] Mr Mong goes on to make the alternative argument that even if this court makes the assumption that the plaintiffs' pleadings in their statement of claim are true, the assumption is only applicable as to the issue of whether the case falls within O 11 r 1(1) of the ROC. Mr Mong submits that the assumption of truth does not apply when the court is dealing with other issues concerning leave to serve a writ out of jurisdiction, such as full and frank disclosure, serious issues to be tried and forum conveniens.

[42] With respect to learned counsel for D1, the Federal Court in *Petrodar* and *Goodness for Import and Export*, and the majority decision of the Court of Appeal in *Matchplan*, did not restrict the assumption of truth by a court to only when it is considering whether the dispute falls within O 11 r 1(1) of the ROC. It would be contrary to the doctrine of stare decisis, if this court were to now restrict the assumption of truth when no such restriction was imposed by either the Court of Appeal and the Federal Court. As Lord Diplock explained in *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong*, a defendant's application to set aside leave of court to serve a notice of writ out of the jurisdiction can only succeed 'if it is shown that, no matter what were the facts that the plaintiffs would be able to establish relating to the subject-matter of the dispute, ... the court would have no power to grant relief of the kind sought against the defendants'. Hence, the necessity for the assumption of truth.

Have the plaintiffs made full and frank disclosure of all material facts when applying for the leave order?

[43] D1 contends that the plaintiffs had failed to fully and frankly disclose all material facts to this court when applying for and obtaining the leave to serve the notice of writ out of jurisdiction. D1 cites as authority for its submission that there must be full and frank disclosure when applying for the leave order, the cases of *Cantrans Services (1965) Ltd v Clifford* [1974] 1 MLJ 141 (FC); *Castle Inn Sdn Bhd v Bumiputra-Commerce Bank Bhd* [2009] 1 MLJ 542; and *Hirex Petroleum Sdn Bhd v Mans Nicklas Lidgren & Ors* [2017] MLJU 456; [2017] 1 LNS 492.

[44] D1 claims that the plaintiffs had failed to disclose in its affidavit in support of the leave application that D1 had no dealings with P2. D1 claims that its dealings were with P1 only. It had no dealings with P2 and there are no documentary evidence showing any dealings between D1 and P2. Learned counsel for D1 submits that this is a material fact as it shows that P2's claim against D1 is clearly unsustainable and devoid of merit.

[45] Next, D1 contends that the plaintiffs failed to disclose that every transaction for the sale of the aluminium products by D1 to the plaintiffs was preceded by what is referred to by D1 as the 'Underlying Agreement' between

A the plaintiffs and D2. D1's case is that P1 after entering into the 'Underlying Agreement, P1 would issue its purchase order to D1, which sets out the products to be purchased and the price payable by P1 to D1, together with the documents required. D1 claims that its role was confined to facilitating the sale and purchase of the aluminium products between P1 and D2 by settling the B 'Guangxin Price' to D2 and providing credit to P1. Learned counsel for D1 submits that these facts show that D1 is not responsible or liable for P1's claim relating to the manufacturer of the aluminium products, the alleged late shipment of the products and the inaccuracy of the mill certificates. D1 also denies that it could have been unjustly enriched since at the outset P1 knew the C price paid by D1 to D2 and that the price paid by P1 to D1 is 1% above the Guangxin Price.

[46] Finally, D1 says that contrary to the plaintiffs' affidavit in support of the D leave order, the aluminium products were delivered by D2 to P1.

[47] Learned counsel for D1 submits that these three materials facts show that D1 is not responsible for the matter concerning the aluminium products and the late shipment of the products. It also shows that D1 did not and could E not have purchased the products from a third-party manufacturer and delivered them to P1.

[48] The plaintiffs deny D1's claim that it had failed to fully and frankly disclose material facts during the application of the leave order. They disagree F with D1's first contention that P2 did not have any dealings with P2. The plaintiffs' deponent avers in her affidavit that after D1's involvement in the sale of the aluminium products, P1 dealt directly with D1 in the purchase of the products from D1, whereby the aluminium products were purchased for P2's order while P1 is named as the purchaser in the sales contract with D1. She says G that D1's averment that the Okaya Price is 1% above the Guangxin Price is a deliberate attempt to confuse this court since the 1% increase is for a period of three months and that the increase per year is 4% as pleaded by the plaintiffs.

H **[49]** The plaintiffs also deny D1's second claim that there is an 'Underlying Agreement' between them and D2. They say that D1's claim of the underlying agreement is without basis and without merit and is an issue that ought to be tried. Learned counsel for the plaintiffs, Mr V Premshangar submits that the documents clearly shows that: (a) the purchase orders for the products were I issued by P1 to D1; (b) after receiving the purchase order D1 would issue a sales contract note and email it to P1; and (c) after receiving the sales contract note from D1, P1 would then sign the sales contract note and email the signed sales contract note to D1.

[50] Mr Premshangar argues that it is evident from these documents that the sales contract for the sale of the aluminium products are between P1 and D1 — and that there is no 'Underlying Agreement' entered between the plaintiffs and D2. The plaintiffs say that it has clearly pleaded in their statement of claim and had clearly disclosed during the leave application the contractual relationship between the parties.

[51] As regards D1's third contention that the products were delivered by D2 to P1, the plaintiffs submit that since the purchase contract for the aluminium products is between D1 and D2, the plaintiffs are not privy to the terms of the purchase contract and the terms agreed between D1 and D2 as the regards the delivery of the products. Thus, there is no merit to D1's claim that the products were delivered by D2.

[52] Based on the plaintiffs' pleadings in their statement of claim and their affidavit filed in support of the leave application, this court finds that the plaintiffs had made full and frank disclosure of all the material facts of its transactions with D1 and D2 in relation to the sales and purchase of the aluminium products and the delivery of the said products and the accompanying mill certificates.

[53] The facts in *Cantrans Services (1965) Ltd v Clifford* [1974] 1 MLJ 141 can be distinguished from the facts of this case. In *Cantrans*, the respondent's application for leave to serve the notice of writ out of the jurisdiction was based solely on O 11 r 1(j) of the RHC, which provides that:

> 1. Service out of jurisdiction of a writ of summon or notice of writ may be allowed by the court or judge whenever —
>
> (j) the court is satisfied —
>
> (i) that the defendant has property within the jurisdiction which could be made available to satisfy the claim of the plaintiff, and
>
> (ii) that the plaintiff's claim cannot be satisfied save by means of a judgment or order of the High Court of the Federation.

[54] However, the appellant in *Cantrans* does not have any property within the Malaysia. Accordingly, the respondent failed to satisfy the requirement in O 11 r 1(j) which was the sole basis on which its application to serve the writ out of the jurisdiction was based.

[55] The facts in *Castle Inn Sdn Bhd v Bumiputra-Commerce Bank Bhd* [2009] 1 MLJ 542 are also distinguishable from this instant case as both the plaintiff and defendant in that case are Malaysian companies carrying on business in Malaysia. As the defendant is a resident of Malaysia, the issue of

service out of the jurisdiction did not arise in *Castle Inn*. The plaintiff's application in *Castle Inn* was to extend the validity of the writ, and not for leave to serve the notice of the writ out of the jurisdiction.

[56] In *Hirex Petroleum Sdn Bhd v Mans Nicklas Lidgren & Ors* [2017] MLJU 456; [2017] 1 LNS 492, Noorin Badaruddin J found that the plaintiff did not have a good cause of action against the first and second defendants because the plaintiff had failed to obtain the approval of all the directors nominated by the shareholders of the plaintiff ('a supra majority') required under the shareholders agreement, prior to filing the suit against the defendants. The court found that the fact that the supra majority was not obtained prior to the filing of the suit meant that the plaintiff's solicitors did not have the necessary mandate to file the suit on the plaintiff's behalf and that there was no good cause of action against the first and second defendants. As against the third defendant, the plaintiff's suit was based on a s 218 Notice of the Companies Act 1965. However, the plaintiff failed to disclose that the s 218 Notice had been withdrawn, thus rendering the entire suit and reliefs prayed by the plaintiff against the third defendant academic. The court held that the non-disclosure of these facts together with some other material facts rendered the leave to serve the notice of writ out of jurisdiction defective and accordingly, allowed the defendants' applications to sent aside the leave order and the service of the notice of writ, as well as the judgment in default of appearance entered against the defendants.

[57] In this instant case, I find that there was no such non-disclosure of material facts as was in *Hirex Petroleum*. The material facts alleged by D1 to not have been disclosed by the plaintiffs during the application for the leave order, are issues that ought to be tried. The first issue of whether the aluminium products, which are the subject-matter of the sales contracts between P1 and D1, were purchased for P2's use is a question of fact that must be ascertained during trial through documentary and viva voce evidence. Similarly, the second issue whether the plaintiffs' confirmation with D2 of the aluminium products to be purchased and the price of the products, amounts to an 'Underlying Agreement' as claimed by D1 is also an issue that has to be decided at trial through the calling of evidence. The answer would depend on whether the necessary elements for a contract, namely, offer, acceptance and consideration were present.

[58] The third issue of whether the products were purchased by D1 from a third-party factory instead of the Guangxi Factory and delivered by D1 to the plaintiffs in Malaysia, as pleaded by the plaintiffs; or were the products delivered by D2 to the plaintiffs in Malaysia, as claimed by D1, are also questions of facts to be determined at trial.

Are there serious issues to be tried

[59] As regards, D1's contention that there are no serious issues to be tried between D1 and the plaintiffs, I have to respectfully disagree with D1. In my view, the issues as to: (a) whether there is an 'Underlying Agreement' between P1 and D2; (b) whether there was an obligation under the sales contracts between P1 and D1, for D1 to supply aluminium products manufactured at the Guangxi Factory and to supply the corresponding mill certificates; (c) whether the aluminium products were delivered to P1 by D1 or by D2; (d) whether the aluminium products, which were the subject matter of the sales contracts between P1 and D1, purchased for D2's use; (e) whether there had been any delay in the shipment of the aluminium products; (f) whether the mill certificates were delivered to P1 by D1 or by D2; (g) whether the plaintiffs suffered any loss as a result of the aluminium products delivered not being manufactured at the Guangxi Factory and the alleged misrepresentation on the mill certificates; and (h) whether the difference between the Guangxin Price and the Okaya Price, is 4% per year as claimed by the plaintiffs or 1% as claimed by D1, are all serious issues that ought to be tried.

Is there a good arguable case?

[60] Learned counsel for D1 also submits that the plaintiffs do not have a good arguable case under O 11 r 1(F)(i) of the ROC since the sales contracts between P1 and D1 were not entered within Malaysia.

[61] The plaintiffs plead in their statement of claim that the sales contracts between the P1 and D1, for the sale and purchase of the aluminium products, were entered in Malaysia since P1 had signed the contracts in Malaysia. The sales contract were prepared and emailed by D1 to P1 in Malaysia, P1 signed the sales contracts in Malaysia and then emailed the signed sales contracts back to D1. The plaintiffs also plead that they discovered the alleged breach of the sales contracts in Malaysia in January 2018.

[62] The deponent of D1's affidavit did not deny the plaintiffs' deponent averment in her affidavits (*afidavit jawapan plaintif-plaintif* and *afidavit jawapan kedua plaintif-plaintif*) that P1 signed the sales contracts in Malaysia. Learned counsel for D1 also did not address, in his submissions, P1's claim that it signed the sales contract in Malaysia. Instead he submits that Hong Kong is the place where D1 issued the sales contract. And in D1's submissions in reply, learned counsel for D1 submits that the fact that the aluminium products were delivered to Malaysia is irrelevant to the issue of breach. He relies on the decision of the English High Court in *Cordova Land Co Ltd v Victor Bros Inc* [1966] 1 WLR 793 as authority. However, that facts in *Cordova Land* can be distinguished from the facts of this instant case. In *Cordova Land*, the parties

agreed that both contracts were made outside the jurisdiction in Boston, USA and were neither by their terms nor by implication governed by English law. Micheal Mustill (later Mustill LJ) who was counsel for the plaintiff in that case frankly admitted that he had no authority for maintaining that a contract made in Boston, USA to ship goods to Hull, UK comprises a warranty that the goods will on discharge in Hull be of the contract description and contract quality. The English High Court accordingly held that there was no breach of contract since there was no implied warranty that the skins shipped from Boston in the USA would be of contract description and quality on arrival in Hull, UK.

[63] Whereas, in this instant case, the plaintiffs' case is that the sales contracts between P1 and D1 were entered in Malaysia; which is a material fact neither denied nor contradicted by D1 in its affidavit. It is trite law, pursuant to the Court of Appeal's decision in *Ng Hee Thoong v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609, D1's failure to deny or contradict this material fact would be treated as unrebutted evidence in support of the plaintiffs' contention of the fact that the sales contracts were entered in Malaysia. Furthermore, pursuant to the legal principle, as discussed in part B of this judgment, that in an application to set-aside a leave order to serve the notice of a writ out of the jurisdiction, the court must assume that the facts pleaded in the statement of claim are true: see the Court of Appeal's majority decision in *Matchplan*, the Federal Court's decision in *Goodness for Import and Export* and the Privy Council's decision in *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong*.

[64] Hence, based on both these legal principles, for purposes of this setting aside application, this court finds that the sales contracts between P1 and D1 were entered in Malaysia. For the reasons discussed above, English High Court's decision in *Cordova Land Co Ltd* is not applicable to the facts of this case. Even if it was, the said decision is only of persuasive authority. The decision of the English courts are not of binding authority on this court; unlike the majority decision of the Malaysian Court of Appeal in *Matchplan*, which learned counsel for D1 has urged this court to depart from.

[65] Additionally, in one of the cases cited by D1, *Vitkovice Horni A Hutni Tezirtvo v Korner* [1951] AC 869, the House of Lords held that in establishing there has been of contract 'committed within the jurisdiction' in an application for leave for service out of the jurisdiction of a writ of summons or notice of writ under O 11 r 1(e) of the Rules of the Supreme Court ('RSC'), 'a plaintiff may fulfil the requirements of the rule while falling short of the standard of proof which must be attained at the trial and he is not obliged to prove the matter beyond all reasonable doubt'. The House of Lords held in that case that the UK Court of Appeal was right to reverse the decision of the High Court judge, who had applying the wrong standard of proof, refused leave for service

out of the jurisdiction on the ground that he was not satisfied that there had been a breach of contract within the jurisdiction.

[66] In another case cited by D1, *Seaconsar Far East Ltd v Banj Markazi Jonhouri Islami Iran* [1993] 4 All ER 843, the House of Lords held that 'the test of the strength of the case on the merits which a plaintiff had to establish for the grant of leave to serve proceedings out of the jurisdiction *was merely whether the evidence disclosed that there was a serious issue to be tried, not whether he had a good arguable case*. (Emphasis added.)

[67] In *Hirex Petroleum* also cited by D1, the High Court had referred to the Federal Court decision in *Joseph bin Paulus Lantip & Ors v Unilever Plc* [2018] Supp MLJ 151; [2012] 7 CLJ 693, where the Federal Court held that in an application to serve the notice of a writ out of the jurisdiction the burden of proof on the plaintiff is to show that he has 'a good arguable case'. Arifin Zakaria CJ in delivering the decision of the Federal Court citing with approval the UK Court of Appeal's decision in *Nicholas Lousis Deak (deceased) and Another v Deak Perera Far East Ltd (In liquidation)* [1991] 1 HKLR 551, which held that 'good arguable case' for purposes of service out of the jurisdiction under O 11 of the RSC, 'meant a good prospect of success at trial. It does not mean that the applicant would probably succeed and may be consistent with the ability of having a good arguable defence'.

[68] For the reasons above, for purposes of the leave order granted under O 11 of the ROC, I find that the plaintiffs has a good arguable case in that they have a 'good prospect of success' — but as held by the UK Court of Appeal in *Nicholas Lousis Deak* and approved by our Federal Court in *Joseph Paulus Lantip & Ors v Unilver Plc* 'a good prospect of success' does not mean that the plaintiffs would probably succeed in the case.

Are the plaintiffs allowed to rely on s 23 of the CJA when they had sought and obtained the leave order under O11 of the ROC?

[69] Learned counsel for D1 submits that the P1 should not be allowed to rely on s 23 of the CJA since they had sought and obtained the leave order under O 11 r 1(1) of the ROC.

[70] With respect to learned counsel for D1, I am curious as to the basis of his submission as he did not cite any authority to support his contention that as the plaintiffs had obtained leave order to serve the notice of the writ out of the jurisdiction, they should not be allowed to rely on s 23 of the CJA.

[71] As discussed in part B of this judgment, the Federal Court had confirmed in *Petrodar* that the High Court's jurisdiction under O 11 of the

RHC is separate and independent of and not predicated on its jurisdiction under s 23 of the CJA. This legal principle was approved and applied by the Federal Court in *Goodness for Import and Export*. In neither of this cases did the Federal Court hold that a plaintiff is not allowed to invoke the court's jurisdiction under s 23 of the CJA if it had obtain leave of the court under O 11 of the ROC to serve the notice of the writ out of the jurisdiction. In fact, in *Goodness for Import and Export*, the Federal Court held that 'in cases where s 23 of the CJA applies, O 11 r 1 of the RHC becomes a mere procedural formality to enable the plaintiff to effect service abroad'.

[72] Furthermore, s 23 of the CJA bestows jurisdiction on the High Court in cases that comes within that said section. Thus, whether or not a plaintiff has obtained leave to serve the notice of the writ out of the jurisdiction under O 11 of the ROC, does not in any away negate or extinguish the High Court's jurisdiction over the non-resident defendant under s 23 of the CJA.

[73] Section 23 of the CJA states:

> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —
>
> (a) the cause of action arose;
>
> (b) the defendant or one of several defendants resides or has his place of business;
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
>
> (d) any land the ownership of which is disputed is situated,
>
> within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

[74] As discussed above, the plaintiffs had pleaded in their statement of claim that the cause of action arose in Malaysia because P1 had signed the sales contracts in Malaysia and the products plus the mill certificates were delivered in Malaysia. Both these facts were also averred by the plaintiffs in their affidavit in support of their application for leave to serve the notice of the writ out of the jurisdiction on both D1 and D2.

[75] Accordingly, I am unable to agree with learned counsel for D1 that just because that plaintiffs had obtained the leave order to serve the notice of the writ on D1 out of the jurisdiction, they are not allowed to rely on s 23 of the CJA.

Is Malaysia a forum non conveniens?

[76] D1's final argument in support of its application to set aside the leave order is that Malaysia is not the forum conveniens, and that the more suitable or appropriate forum is the Court in Hong Kong or in the PRC. D1 relies on the *Spiliada Maritime v Consulex Ltd 'The Spiliada'* [1986] 3 All ER 843, *American Express Bank*, and *Cantrans*.

[77] In support of their argument that Malaysia is a *forum non conveniens,* D1 submits that D1's agreement with P1 for every transaction was made in Hong Kong, that P1 is obliged to remit payment of D1's invoices in USD to D1 in Hong Kong, and D1 does not have any presence in Malaysia. Relying on *Cantrans*, learned counsel argues that therefore, the issues between P1 and D1 are governed by the laws of Hong Kong.

[78] However, as discussed above, *Cantrans* can be distinguished from this instant case based on its facts. In *Cantrans* the application for leave to serve the notice of writ out of the jurisdiction was based solely on O 11 r 1(j) of the RHC, which is premised on the defendant having property in the jurisdiction that can be made available to satisfy the plaintiff's claim. But as the defendant in *Cantrans* did not have any property in Malaysia, the plaintiff failed to satisfy the requirement in O 11 r 1(j) of the RHC. In this instant case, the plaintiffs had applied for leave to serve out of the jurisdiction on, among others, that their cause of action against the D1 was for alleged breaches of the sales contracts, which were all made in the jurisdiction. This falls squarely within O 11 r (1)(F)(i) of the ROC and s 23(1)(a) of the CJA.

[79] For the reasons discussed earlier in this judgment, the facts show that the sales contracts between P1 and D1 were entered in Malaysia — they were not entered in Hong Kong as submitted by learned counsel for D1.

[80] The plaintiffs dispute D1's contention that D1 does not have any presence in Malaysia. They maintain that D1 has presence in Malaysia through a company named 'Okaya International (M) Sdn Bhd' ('Okaya Malaysia'). Both Okaya Malaysia and D1 share the same shareholder — D1 is wholly owned by Okaya & Co Ltd and Okaya Malaysia's majority shareholder is also Okaya & Co Ltd.

[81] The plaintiffs' deponent avers in the plaintiffs' affidavit in reply that after D1 had entered into the business transaction with the plaintiffs, representatives from Okaya Malaysia met with P1's directors informing them that: (a) D1 and Okaya Malaysia are related companies; (b) both Okaya Malaysia and D1 are involved in the sale and supply of aluminium products; and (c) P1 can purchase aluminium products from Okaya Malaysia. The plaintiffs had exhibited in their affidavit, the name cards of the representatives of Okaya Malaysia who had met with P1, the SSM search results and company

information on Okaya Malaysia. The plaintiffs also aver that Mr Akiya Toshiyuki, D1's managing director and deponent of its affidavit had come several times to Malaysia to meet with P1's directors in order to try to settle the dispute between them.

[82] The House of Lords' decision in *Spiliada Maritime v Consulex Ltd 'The Spiliada'* [1986] 3 All ER 843 *is the locus classicus on the doctrine of forum non conveniens*; it was referred to with approval by our Supreme Court in *American Express Bank*. Peh Swee Chin SCJ (as he then was) in delivering the judgment of the Supreme Court in *American Express Bank* said the following as regards the doctrine of *forum non conveniens* and *The Spiliada*:

> As indicated, having such jurisdiction was not the end of the matter; the foreign bank applied to set aside the leave granted *ex parte* earlier to issue and serve the writ of summons out of jurisdiction. The High Court would have to consider, next, to exercise its discretion on the doctrine of *forum non conveniens* as to whether to allow or not, the application of the foreign bank, in this case, to set aside the leave to issue and serve out of jurisdiction on the foreign bank granted earlier under O 11 r 1 of the RHC to the bank customers.
>
> The doctrine of *forum non conveniens* appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritime Corp v Consulax Ltd (The Spiliada)* [1986] 3 All ER 843 after a series of decisions, as described and set out so well in that very interesting and readable joint article by RH Hickling and Assoc Prof Wu Min Aun [1994] 3 MLJ xcvii.
>
> The main judgment in *the Spiliada* was delivered by Lord Goff, who adopted the dictum of Lord Kinnear in *Sim v Robinow* [1892] 19 R (ct of Sess) 665, 668 as being *the fundamental principle in regard to this doctrine ie that 'there is some other tribunal, having competent jurisdiction, in which, the case may be tried more suitably for the interests of all parties and for the ends of justice.' Lord Goff cautioned that the word 'conveniens ' in 'forum non conveniens' meant suitability or appropriateness of the relevant jurisdiction and not one of convenience.* We are in entire agreement with the fundamental principle so expressed. (Emphasis added.)

[83] In referring to the 'natural forum' as being 'that with which the action had the most real and substantial connection' Lord Goff said in *The Spiliada* at p 478:

> So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Credit Chimique v James Scott Engineering Group Ltd*, 1982 SLT 131), and the places where the parties respectively reside or carry on business.

[84] *Black's Law Dictionary* (2nd Ed) defines 'forum non conveniens' is a legal doctrine whereby a court 'acknowledges that another forum or court is more appropriate and sends the case to such a forum. A change of venue where

another venue is more appropriate to adjudicate a matter, such as the jurisdiction within which an accident occurred and where all the witnesses reside.' A

[85] The plaintiffs' argue that the courts in Malaysia is the suitable or appropriate forum to hear this case. This is because the contracts between P1 and D1 were entered in Malaysia; the products and the mill certificates were delivered to P1 in Malaysia; the plaintiffs discovered the breach in Malaysia in January 2018 after three years of dealing with D1; the products had been supplied to the plaintiffs' customers in Malaysia and the fraudulent mill certificates are with the said customers in Malaysia. B C

[86] The facts in *American Express Bank* can be distinguished from the facts of this instant case. In that case, the agreements and the foreign exchange transactions were all executed out of the jurisdiction — the agreements were executed in Singapore and the foreign exchange transactions were executed in London, New York and Singapore. Both the parties in that case, by the agreements, had agreed to submit to the jurisdiction of the Singapore Courts and be governed by the laws of Singapore. The Supreme Court held based on the facts of the case, the High Court in Malaysia was a *forum non conveniens* — the respondents in that case had failed to satisfy the court that the High Court in Malaysia was the most appropriate forum to try the action. The Supreme Court found that Singapore to be the more suitable forum. D E

[87] This court in deciding whether or not Malaysia is a *forum non conveniens* must look at all the facts of the case to determine whether there is a more suitable or appropriate forum to try this action. F

[88] In my view, the fact that the proceedings in Hong Kong are governed by the Hong Kong Rules of the High Court 1998 ('HK RHC'), which learned counsel D1 submits is similar to the Malaysian RHC and that D1 is currently taking steps to apply from the Hong Kong Court under the HK RHC for leave to issue the writ notice and leave to the writ notice and to serve D1's writ against P1 out of Hong Kong's jurisdiction, does not make the courts in Hong Kong the suitable or appropriate venue to try the dispute between the parties. G H

[89] In this instant case, the facts show that save for the payment for the products are to be made by P1 in US Dollars ('USD') to D1 in Hong Kong, all the other transactions and the alleged breaches of contracts had taken place in Malaysia. The facts show that the contracts between P1 and D1 were executed in Malaysia; the aluminium products and the mill certificates were delivered to P1 in Malaysia; the breach occurred in Malaysia; the breach was discovered in Malaysia; the plaintiffs had onward sold the aluminium products and provided the fraudulent mill certificates to its customers in Malaysia. I

[90] Nevertheless, even though P1's payments for the aluminium products are to be made to D1 in Hong Kong, the payments are made through online bank transfers — it does not necessitate P1 to physically fly to Hong Kong with the USD in cash to pay to D1.

[91] As held by Peh Swee Chin SCJ for the Supreme Court in *American Express Bank*:

> out of a great variety of factors that a Malaysian court ought to consider in applying the said doctrine (of *forum non conveniens*); *the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection*. (Emphasis added.)

[92] After considering all the factors, this court finds that Malaysia is the forum which has the most real and substantial connection to this instant case. Therefore, the courts in Malaysia is the more suitable or appropriate forum to try this action than the courts in Hong Kong and/or the PRC.

DECISION

[93] For the reasons discussed above, this court finds that the High Court of Malaya has the jurisdiction to try this action between the plaintiffs and D1 under O 11 r 1 of the ROC and under s 23 of the CJA. This court also finds that Malaysia is not a *forum non conveniens* and that the High Court of Malaya is the most suitable or appropriate forum to try this action.

[94] Accordingly, D1's application in encl 17 to set aside the writ and statement of claim, the notice of the writ and the leave order, is dismissed with costs.

Setting aside application for encl 17.

Reported by Mohd Kamarul Anwar